Supreme Court, U.S.
F I L E D
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No. 92-149

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

PULSAR SYSTEMS, INC., A/K/A PULSAR CREDIT CORP. AND PULSAR CORP.,
Petitioner

v.

FEDERAL MARKETING CONSULTANTS, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 2, 1992

QUESTION PRESENTED

Does Va. Code Section 8.01-329C, providing for service on the Secretary of the Commonwealth and the mailing of a copy of the summons and motion to the defendant by first class postage prepaid, violate the Due Process Clause?

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Respondent herein respectfully requests that this Court deny the Petitioner's Petition for Writ of Certiorari filed previously hereto in this matter.

STATEMENT OF THE CASE

The Respondent in this case, Federal Marketing Consultants, Inc. ("FMC") is a corporation organized and existing under the laws of the Commonwealth of Virginia. [1] The Consulting Agreement

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[1] FMC has no parent company or subsidiary.

between FMC and the Petitioner in this case, Pulsar Data Systems, Inc., a/k/a Pulsar Credit Corporation and Pulsar Corporation, ("Pulsar") was executed by the parties in the Commonwealth of Virginia. At the time of the execution of the Consulting Agreement, the parties contemplated that the work to be performed thereunder would be performed by FMC in the Commonwealth of Virginia and the District of Columbia. The president of Pulsar met with representatives of FMC in the Commonwealth of Virginia on several occasions to assist in the work being performed under the Consulting Agreement. At no time subsequent to the execution of the Consulting Agreement was Pulsar registered in Virginia as a foreign corporation qualified to do business therein.

Subsequent to the filing of a Motion for Judgment against Pulsar under the Consulting Agreement, service was had on Pulsar through the Secretary of the Commonwealth pursuant to Va. Code Section 8.01-329. The Secretary of the Commonwealth mailed a copy of the Summons and the Motion for Judgment to Pulsar by prepaid, first class mail, and filed a Certificate of Compliance with the clerk of the Circuit Court of Fairfax County, Virginia as proof thereof.

Pulsar argued at the July 26th hearing that FMC had failed to use the proper address. However, FMC presented as evidence

stationary from Pulsar showing the exact address used by the Secretary of the Commonwealth. Furthermore, at no time during these proceedings did Pulsar present evidence that the Summons and copy of the Motion for Judgment mailed by the Secretary of the Commonwealth had been returned to the office of the Secretary of the Commonwealth as undeliverable.

SUMMARY OF ARGUMENT

1. THIS COURT HAS ALREADY DETERMINED THE DEFINITION OF ACTUAL NOTICE UNDER THE DUE PROCESS REQUIREMENT

A. Service by Regular Mail Does Not Violate the Due Process Guarantee of Actual Notice

This Court has previously held that the Due Process Clause of the Fourteenth Amendment requires actual notice before a person can be deprived of his property rights. But this Court has consistently and repeatedly ruled that mailing by first class, prepaid mail constitutes actual notice. Under this principle, long established by the United States Supreme Court, the Virginia law in question meets the notice requirements of the Due Process Clause.

B. The Due Process Clause Does Not Require Actual Receipt of Notice Under the Facts of This Case

There is no support for Pulsar's position that the Due Process Clause requires actual receipt of actual notice.

C. Va. Code Section 8.01-329 Meets the Requirements of Actual Notice

Under the case law well-established by this Court, Virginia Code Section 8.01-329 provides for actual notice as required under the Due Process Clause.

2. THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT ANY ACTION BEYOND ACTUAL NOTICE

The situation in which Pulsar finds itself is one of its own making. Pulsar could have protected against service through the Secretary by appointing a registered agent in the Commonwealth of Virginia of its own selection, one who would presumably notify Pulsar by something other than regular mail. The circumstances of this case do not warrant the requirement of anything more than actual notice by first class, prepaid mail.

3. THE REQUIREMENT OF ACTUAL RECEIPT OF NOTICE WOULD OVERBURDEN STATE AND LOCAL GOVERNMENTS

If actual receipt of actual notice is required, the court system would be overburdened, and the time necessary to ensure compliance therewith would significantly and adversely effect the efficiency of justice.

ARGUMENT

1. THIS COURT HAS ALREADY DETERMINED THE DEFINITION OF ACTUAL NOTICE UNDER THE DUE PROCESS REQUIREMENT

A. Service by Regular Mail Does Not Violate the Due Process Guarantee of Actual Notice

Under Va. Code Section 8.01-329 , if personal jurisdiction is authorized under Va. Code Section 8.01-328.1 (the "Virginia long-arm statute") service may be had through the Secretary of the Commonwealth if the corporation is a foreign corporation that has failed to appoint a registered agent in Virginia. Service through the Secretary provides notice to the defendant through regular mail to the last known address of the defendant. Pulsar's position is that only actual receipt of actual notice by a defendant is sufficient to satisfy the tenets of the Due Process Clause.

Previously, this Court has had ample opportunity to examine the question of what manner of notice is required under the Due Process Clause of the United States Constitution. Beginning with *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950), it has consistently held that service under the Due Process Clause requires

notice that is "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action..." *Id.* at 314 (emphasis added). The reasonableness of the notice is based of the particular circumstances of each case. *Id.* Under the *Mullane* decision, when service is had by publication, mailing of notice by regular first class mail is deemed to constitute actual notice thereof.

Subsequent to *Mullane*, an entire body of law has evolved which has clearly established the principle that mailing by regular mail meets the criteria for actual notice under the Due Process Clause. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 479 (1988) ; *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) ; Greene v. Lindsey, 456 U.S. 445 (1982); *Walker v. City Hutchinson*, 352 U.S. 112 (1956).

Defendant claims that Va. Code Section 8.01-329 violates the Due Process Clause because it is contrary to the holding in *Mennonite* requiring that constitutional notice must be designed to provide actual notice, as that term is defined therein. Plaintiff's Petition at 12. Pulsar has misapplied *Mennonite*. In the opinion in that case, this Court, citing *Mullane*, stated that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the ... property interests of any party..." . *Id.*, at 800. This

opinion equated mailed notice to actual notice. Since there is no requirement for notice beyond that provided by first class mail, Va. Code Section 8.01-329 meets the standard constitutional test of due process.

Pulsar claims that because Virginia law permits service by ordinary mail to be conclusive upon mailing, its due process interests have been violated by the state's failure to require receipt of actual notice. Pulsar cites *Basile v. American Filter Service, Inc.*, Va. , 340 S.E.2d 800 (1986) as holding that service can not be invalidated because of the defendant's failure to receive notice. Defendant's Petition at 7. However, Pulsar has misstated the Virginia Supreme Court's holding. The question posed to the Virginia Supreme Court in that case was whether or not a trial court had exceeded its authority under a particular Va. statute to set aside a default judgment. That statute permitted a default judgment to be set aside only in three clearly definable sets of circumstances. The Virginia Supreme Court held that since none of those circumstances had been met, the trial court had exceeded its authority under the statute. The positions attributed by Pulsar as to the conclusiveness of service are mere *dicta*. Moreover, the court's opinion does not conclude that a defendant has no recourse once notice is placed in the "delivery system", as asserted by Pulsar. Defendant's Petition at

12. To the contrary, the Virginia Supreme Court emphasized that while the particular statute in question there did not permit the court to overturn the default judgment, a defendant has other remedies to challenge the failure to receive notice.

B. The Due Process Clause Does Not Require Actual Receipt of Actual Notice Under the Facts of This Case

Pulsar has conspicuously failed to cite any cases that support its assertion that actual receipt of actual notice is mandated by the Due Process Clause. Instead, it attempts to bolster its position by claiming that forty-five jurisdictions require mailing by certified or registered mail. Pulsar overlooks the fact that the statutes it cites are only a singular part of each state's civil process requirements. Even among those states that may require notice under the long-arm statute to be mailed by certified or registered, return receipt requested mail, many states permit mailing by regular first class mail when service is had through publication, or in other instances of substituted service.[2] The Federal Rules of Civil Procedure do not require service to be by certified or registered return receipt requested mailing. Even the Rules of this Court permit service by mailing first class postage prepaid. Rules of the Supreme Court of the United States, Rule 29.3 .

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[2] See Appendix A-1 for citation of relevant statutes or rules

C. Va. Code Section 8.01-329 Meets the Requirements of Actual Notice

The Va. Code Section 8.01-329 provides that when a corporation, such as Pulsar, does business in Virginia but fails to qualify a registered agent to accept process, the Secretary of the Commonwealth is to serve as the agent of such company. Service is made on the Secretary by the sheriff of the City of Richmond, Virginia. The Secretary mails a copy of the summons and pleading, and certifies such action in writing. This notice provision meets the standards that this Court has followed since *Mullane*.

2. THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT ANY ACTION BEYOND ACTUAL NOTICE

The circumstances of this case do not require anything beyond the mailing of the summons and motion for judgment served on the Secretary of the Commonwealth. Pulsar neglects to note that the lack of notice of which it is complaining is a product of its own doing. Pulsar could have qualified as a foreign corporation doing business in Virginia, and could have appointed a resident to serve as agent to receive service of process in the event of civil litigation. Had it done so, Pulsar's selected agent, and not the statutorily appointed agent, would have been personally served with notice of the Virginia suit. (Under Pulsar's argument, Pulsar would have been

denied sufficient notice even if its self-appointed agent had sent a copy of the notice by regular mail.)

Pulsar refused to comply with Virginia law, and now complains that Virginia law should be nullified to excuse its own willful misfeasance.

3. THE REQUIREMENT OF ACTUAL RECEIPT OF ACTUAL NOTICE WOULD OVERBURDEN STATE AND LOCAL GOVERNMENTS

Pulsar asks this Court to overturn the entire *Mullane* line of cases and hold that only actual receipt of actual notice is sufficient under the Due Process Clause. Pulsar fails to establish the parameters of what it maintains would constitute actual receipt of actual notice. If actual receipt of actual notice was satisfied by certified or registered return receipt requested, this would place a heavy burden on the courts or governing entities in terms of time and cost. Moreover, even Pulsar admits that this is not always an effective method of ensuring notice.

To properly ensure actual receipt of actual notice would require more than a certified or registered, return receipt requested letter. The court or governmental entity would need to obtain the notarized signature of the individual defendant or the notarized signature of an authorized person for the non-individual defendant,

acknowledging the acceptance of notice. This would place an intolerable burden on the courts, local entities, and the plaintiffs.

Because of the judicial precedent that allows notice to be sent by regular mail, it is likely that virtually every state and every local jurisdiction permit some notices effecting property interests to be delivered by regular first class mail. Pulsar would require that every state and jurisdiction rewrite its laws and ordinances, when there is already a judicially approved method - first class prepaid mailing - that is "an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice". *Tulsa*, at 490. Pulsar's position would needlessly overextend the constitutional definition of actual notice. Notice beyond first class prepaid mail is not constitutionally required.

CONCLUSION

This Court has already held that notice by regular mail is sufficient notice under the Due Process Clause. Pulsar has not submitted any case law or practical justification that should cause this Court to overrule its previous decisions. For these reasons, FMC asks that Pulsar's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Statutes and Rules of Other Jurisdictions

Alabama - Ala. Code of 1975, Section 43-2-198.
Alaska - Alaska Statutes, 1986 Rev., Section 10.05.642
Arizona - Ariz. Rules of Civil Procedure 4(d).
California - Cal. Code of Civil Procedure 415.50.
Colorado - Colo. Rules of Civil Procedure 4(h).
District of Columbia - D.C. Code Section 29-399.9(b).
Florida - Fla. Statutes Section 49.12.
Georgia - Code of Ga., Annot., Section 9-11(e).
Idaho - Idaho Code, Sections 5-508, 5-509.
Illinois - Ill. Rules of Civil Procedure 60.1.
Kansas - Kans. Stat. Annot., Section 60.307.
Maine - Me. Rules of Civil Procedure 4(g).
Maryland - Rules of Civil Procedure 2-122(a).
Minnesota - Rules of Civil Procedure 4.04.
Mississippi - Miss. Rules of Civil Procedure 4.
Missouri - Mo. Rules of Civil Procedure 54.17.
Nebraska - Neb. Rev. Stat., Section 25-520.01.
New Mexico - N.M. Rules of Civil Procedure 1.004(G).
North Carolina - N.C. Gen. Stat. 1A-1, N.C. R.C.P. 4(j).
North Dakota - N.D. R.C.P. 4.
Oregon - O. R.C.P. 7(D).
South Dakota - S.D. Cod. Laws, Section 15-9-16 et seq.
Utah - U. R.C.P. 4(f).
Vermont - V. R.C.P. 4(g).
Washington - W. R.C.P. 4(d).
West Virginia - W.Va. R.C.P. 4(e).
Wisconsin - W. Stat. 801.11.